United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7140

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

M & T CHEMICALS, INC.,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee,

and

HERMAN KORETZKY,

Defendant-Appellee.

B

P/S

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING A MOTION FOR AN ORDER UNDER RULE 4(a), FEDERAL RULES OF APPELLATE PROCEDURE

Brief for Defendants-Appellees International Business Machines Corporation and Herman Koretzky

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APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING A MOTION FOR AN ORDER UNDER RULE 4(a), RULES OF APPELLATE PROCEDURE

Brief for Defendants-Appellees INTERNATIONAL BUSINESS MACHINES CORPORATION AND HERMAN KORETZKY

I

INTRODUCTION

The sole issue before this Court is whether Judge Carter's refusal to extend the period of appeal was such a clear error of judgment as to constitute an abuse of judicial discretion.

There is a controversy regarding the facts surrounding M&T's failure to file a timely appeal from the lower Court's Order of January 9, 1976. M&T's brief on appeal sets forth, at pages 3-16, a statement of the case which constitutes only a partial, and therefore misleading, version of various events. The showing submitted by M&T's counsel appears in three affidavits, i.e., an affidavit dated February 20, 1976, by Pasquale A. Razzano, one of M&T's attorneys (A 57-59), an affidavit dated February 24, 1976, by John A. Mitchell, another of M&T's attorneys (A 68-75), and a second affidavit of Mr. Mitchell dated February 27, 1976 (A 98-101). As will be discussed, these three affidavits raise more questions than they answer since they contain various ambiguities and, as noted by Judge Carter (A 107-8), are deficient in certain important respects.

Considered in their best light, the affidavits confirm that M&T's counsel were guilty of inexcusable neglect in failing to file a timely notice of appeal, and that Judge Carter did not abuse his judicial discretion in so holding. Indeed Judge Carter's decision is entirely correct and consistent with precedent.

Defendants-Appellees, International Business Machines Corporation and Herman Koretzky (hereinafter referred to collectively as "IBM") disagree with M&T's

version of the facts, and therefore present the following counterstatement.

II

COUNTERSTATEMENT OF THE CASE

On November 19, 1975, the District Court rendered an Opinion (A 17-31) granting IBM's motion to dismiss M&T's complaint in the instant case on the ground that the Statute of Limitations had run.

The District Court's Judgment and Order dismissing the complaint was filed December 5, 1975 (A 32).

On December 15, 1975, M&T filed a motion seeking reargument of the Court's November 19 decision (A 34).

On January 8, 1976, the District Court denied M&T's motion for reargument and specified that a notice of appeal had to be filed within thirty days from the date of the Court's endorsement (A 46).

On February 19, 1976, six weeks later, M&T's counsel checked the Court's docket (A 58) and, on the next day, filed a motion to enlarge the time for appeal under FRAP 4(a) (A 55) the denial of which (A 102-108) has resulted in the instant appeal.

During the 9-1/2 week period from December 15, 1975 (when M&T filed its motion for reargument) to February

19, 1976 (when M&T's counsel checked the docket at the Court), M&T's counsel inquired as to the status of the case at the Court only once, i.e., on January 5, 1976, three days before Judge Carter denied M&T's motion for reargument (A 46).

M&T's counsel allege that, despite their failure to make even a telephone inquiry as to the status of the case from January 5, 1976 to February 19, 1976, other circumstances demonstrate that their lack of action during this six-week period constitutes "excusable neglect". The District Court held otherwise (A 102 et seq). In order that this Court will appreciate the basis of the District Court's holding, the following three matters will be analyzed in detail in this counterstatement.

A. The actual contacts which M&T's counsel had with the District Court during the six-week period,

B. The manner in which M&T's counsel checked the New York Law Journal during the six-week period, and

C. The matter of the post card (A 88) mailed by the Clerk on January 12, 1976, (A 3) informing counsel that the District Court's endorsement had been entered on January 9, 1976.

A. M&T's Actual Contacts with The District Court During the Six Week Period

M&T's motion for reargument was filed at the District Court on December 15, 1975. Three weeks later, on January 5, 1976, M&T's counsel telephoned Judge Carter's chambers to determine whether or not the Court had ruled on their motion (A 69) since the motion had already been pending three weeks and M&T was desirous of filing a memorandum in reply to one filed by IBM in the interim. M&T's counsel was advised on January 5, 1976, that no decision had been rendered, and they accordingly commenced preparation of M&T's reply memorandum. The reply memorandum was filed ten days later. However M&T's counsel did not check with the Court on January 15, 1976, when the reply memorandum was filed, or immediately prior thereto, to determine whether a decision had been rendered in the intervening ten days. There is no explanation in the affidavits or record for counsel's failure to check the status of the case on or immediately prior to January 15, 1976.

Since M&T's counsel recognized the possibility of a decision having been rendered on January 5, 1976, when Mr. Mitchell telephoned the trial judge's chambers, it can logically be inferred that counsel recognized

the even greater possibility of such a decision having been rendered ten days later. If M&T's counsel had checked the status of the case when M&T's reply memorandum was filed on January 15, counsel would have learned that a decision had been rendered almost a week earlier (on January 8, 1976). The fact remains, however, that counsel did not check with the Court on January 15, or for more than a month thereafter.

The affidavits submitted by M&T do not recite the number of contacts which M&T's counsel had with the District Court during the next month. However Mr. Mitchell admits that he was at the District Court "in another matter" during working hours on February 13, 1976 (A 99-100, paragraph 6). Mr. Mitchell did not check with Judge Carter's chambers or the docket sheet regarding the instant case when he was at the Court. Instead, he alleges that, upon returning to his office, he left a note requesting that Mr. Razzano, his co-counsel, do so (A 70, 99-100).

The note which Mr. Mitchell says he left for Mr. Razzano has not been made of record. There is no explanation for its absence. The note apparently requested that Razzano

> "have the docket entries in the Clerk's office for this case checked to determine whether or not there has been a decision handed down" (A 70, underlining added)

The language of the note is significant for, rather than merely asking for a status check, it clearly reflects Mr. Mitchell's suspicion that a decision might have already been rendered. This is confirmed by M&T's brief on appeal (p. 13) where the note is characterized as a request to Razzano to have someone check the docket entries at the District Court "to be sure a decision of the Court was not overlooked". In these circumstances, Mr. Mitchell's failure to check the docket himself when he was actually at the Court earlier that same day is difficult to understand, and is not explained in the affidavits of record.

Since it should have been clear to Mr. Razzano from the Mitchell note of February 13, 1976, that Mr. Mitchell suspected a decision might indeed have been rendered, it is also difficult to understand why Mr. Razzano did not check with the Court on the next business day, February 17, or on the day thereafter. Razzano finally checked on February 19, 1976 (A 58). The affidavits provide no explanation for Mr. Razzano's delay of several days in checking the docket.

The Affidavits of M&T's counsel thus establish that, during the six-week period when counsel did not check the status of the case at the Court even once, there were at least two occasions (on January 15 and February 13, 1976) when someone from counsel's office was actually at the District Court and could easily have done so. The affidavits of record further establish that, on each occasion, M&T's counsel suspected, or should have had reason to suspect, that a decision had indeed been rendered. These circumstances, coupled with the totally unexplained final delay in contacting the Court, from February 13 to February 19, 1976, preclude any possibility of excusable neglect.

B. The Manner In Which the New York Law Journal Was Supposedly Checked During the Six Week Period

M&T's counsel attempt to justify their failure to check the status of this case at the Court for six weeks by alleging that, during that six-week period, they were monitoring the New York Law Journal. Judge Carter held, however, that their checking of the Law Journal "was apparently done without great care" (A 107). This holding is clearly correct.

The affidavits of record are confused and incomplete in respect to who was checking the Journal, and when. Mr. Mitchell states (A 100) that:

> "the normal procedure in our office is to have decisions in the Law Journal checked daily by a clerk ***" (Emphasis added.)

The clerk is unidentified, and no affidavit or other statement from that clerk has been submitted. If the "normal procedure" was followed in this case, the absence of the clerk's affidavit is a significant omission. If the "normal procedure" was not followed, however, this too would be significant, i.e., was the clerk who normally checks the Journal instructed not to do so, and if so, why?

Mr. Mitchell states that two attorneys "were assigned" to check the Journal (A 100). These two attorneys were, presumably, Messrs. Mitchell and Razzano for no other attorneys are identified anywhere in the affidavits. The affidavits do not say "when" this assignment was made; it is curious, for example, that Mr. Razzano was apparently not even aware that Mr. Mitchell was checking the Law Journal until he spoke with Mr. Mitchell on February 19, 1976 (A 58, ¶'s 4, 5). Assuming, however, that Razzano was

"assigned" to check the Law Journal in December 1975 or early January 1976, it is clear that he did not do so with any great care. Mr. Razzano's affidavit frankly admits that he may have "omitted to review the Journal on January 13, 1976, the day the notice was printed" (A 58).

Mr. Mitchell states that he did review the Law Journal of January 13, 1976, but "did not see" the notice concerning Judge Carter's decision (A 70). He attempts to justify his oversight by the fact that two sets of decisions were published on the same day. However this Court can take judicial notice (and since Mr. Mitchell regularly reviewed the Law Journal, he should have known) that more than one day's Southern District decisions frequently appear in a given issue of the Journal. If Mr. Mitchell had been careful in his review, he would have seen the printed notice in the Law Journal on January 13, 1976, just as IBM's counsel did (A 79).

The checking of the Law Journal thus reduces to the following:

Three persons in the office of M&T's counsel supposedly check the Law Journal daily. One is a clerk. The record is silent as to the identity of that clerk, or whether the clerk found the notice printed on January 13, 1976, and, if so, what then occurred. The second person is M&T's attorney, Mr. Razzano, who

admits that, on the day the notice was published in the Law Journal, he may have failed to do the checking which was supposedly assigned to him. And the third person is M&T's attorney Mr. Mitchell who says, in effect, that he did not check the Law Journal with sufficient care to see the notice on the day it appeared.

C. The Matter Of The Supposedly Missing Post Card

M&T contends that its counsel failed to receive a post card from the Clerk regarding the District Court's endorsement of January 8, 1976. M&T's counsel speculate that the post card was misaddressed. IBM disagrees. IBM further disagrees that there is adequate support in the record for M&T counsel's contention that they did not receive the post card sent to them by the Clerk.

Dealing first with the alleged "misaddress", it is clear that the docket sheet for this case kept by the Clerk's office contains the correct address for M&T's counsel (A 1). On December 10, 1975, (a month before the "missing" card was sent) the Clerk sent notice cards to counsel for both sides (A 3, line 16)

regarding the filing of the Court's Judgment and Order on December 5, 1975. M&T's counsel admits that they received this earlier post card (A 68, ¶3). The docket sheet (A 3) also reveals that, from time to time, the District Court mailed other documents to Counsel for both sides, and such documents "have been received [by M&T's counsel] from the Court in this case" (A 70, ¶7).

M&T's counsel have not made of record copies of the various other post cards and documents mailed to and admittedly received by them. It is therefore impossible on the basis of the present record to determine how they were addressed. However the address used by the Clerk was clearly adequate to insure delivery of notice post cards to M&T's counsel both before and after the mailing of the Clerk's January 12, 1976 card.

In these circumstances, it was clearly proper for the District Court to infer that the Clerk's post card of January 12, 1976, which had indeed been mailed by the Clerk (A 3) and received by IBM's counsel (A 79, 88), was also mailed to M&T's counsel at a correct address. There is no substance to the

speculation of M&T's counsel that the card was incorrectly addressed where, as here, correctly-addressed cards not made of record were admittedly received by M&T's counsel both before and after the event in question.

Moreover, the affidavits of record do not dispel the very real possibility that the Clerk's notice card of January 12, 1976, was duly received by the office of M&T's counsel and that, due to error or inadvertence, it was then handled in a fashion other than that regularly employed. After M&T's counsel checked the Court's docket sheet on February 19, 1976, Mr. Razzano looked for the missing post card in the file kept "for this case" (A 58, ¶7). Insofar as can be determined from the record, no other files were searched by M&T's counsel, or by any other attorney, clerk, or secretary in their office. The affidavits of record say nothing about a search in counsel's office adequate to determine whether the notice card may have been simply misfiled, or not filed at all.

IBM raised the issue of such possible misfiling during the proceedings before Judge Carter (A 83-84). Nevertheless, the record does not indicate

that any subsequent search was conducted at the office of M&T's counsel, or through other files of M&T or of other clients, to dispel the very real possibility that the Clerk's notice card was actually received and then misfiled (A 122).

III

ARGUMENT

A. The Only Question Before This Court Is Whether Judge Carter Abused His Judicial Discretion; M&T's Brief Misquotes The Josephson Decision

IBM disagrees with various statements appearing in M&T's brief on appeal (e.g., pages 3-5 and 30) relating to the substantive issues earlier involved in this litigation. However, nothing further will be said herein about this matter since the merits of the litigation are irrelevant to the question here on appeal. As stated by this Court in Lowry v. The Long Island Rail Road Company, 370 F.2d 911, 912 (2d Cir. 1966):

> "The sole question before us on the appeal from denial of the petition for extension is whether the denial was an abuse of judicial discretion."

In Lowry, this Court cited with approval the definition of "abuse of discretion" appearing in In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954). M&T's brief on appeal also refers to the Josephson definition. However the "quotation" appearing at pages 18-19 of M&T's brief, purportedly taken from Josephson, nowhere appears in that decision. The definition which actually appears in Josephson is as follows:

> "'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."

In view of the facts in the instant case, particularly as completed by the preceding counter-statement of the facts, it is submitted that there is no basis for holding that Judge Carter committed "a clear error of judgment".

At pages 22-23 of their brief on appeal, M&T cites Judge Kerner's decision in In re A. Roth Co. Inc., 125 F.2d 396, 398 (7th Cir. 1942). In that case, the Court held:

> "If there is controversy as to facts, and if the facts themselves largely define the wisdom of the discretion, review by the appellate court is seldom effective and it should not be. Then appellate's court's review does not involve trial court's discretion."

This holding confirms that Judge Carter's exercise of discretion should be left undisturbed by this Court. Unless M&T agrees with IBM's counterstatement of the facts, it is apparent that there is a major controversy as to the facts surrounding M&T's failure to file a timely appeal. On the other hand, if M&T agrees with IBM's counterstatement of the facts, it is equally clear that Judge Carter had no alternative but to hold, as he did, that M&T's failure to file a timely appeal was not the result of excusable neglect.

B. M&T's Affidavits Are Totally Inadequate To Establish "Excusable Neglect"

It is submitted that M&T has not made an adequate showing that its failure to file an appeal within the time set by the Court's Order of January 9, 1976, resulted from "excusable neglect". 9 Moore's Federal Practice §204.13[3] (p. 978), citing FRCP 7(b), states:

> "The motion should state with particularity the grounds that constitute excusable neglect."

It is well settled that, in considering a motion under Rule 4(a) FRAP, a Court should construe the "excusable neglect" requirement thereof in a manner which will not unduly impair the finality of judgments; 9 Moore's Federal Practice §204.13[1], p. 968. The standard of excusable neglect is a strict one. See Changes in the Federal Appellate Rules, by R. L. Stern, 41 FRD 297, 299:

> "The Committee intended that the standard of excusable neglect remain a strict one, however. We did not want lawyers to be taking advantage of this extra 30 days as a matter of course; it is not meant to cover the usual excuse that the lawyer is too busy, which can be used, perhaps truthfully, in almost every case. *** [The standard is intended] to take care of emergency situations only." (Underlining and matter in brackets added.)

See also Pasquale v. Finch, 418 F.2d 627, 630 (1st Cir. 1969):

> "To say otherwise is so to enlarge a remedial power devised for the exceptional case as to cover any kind of garden-variety oversight."

The affidavits submitted by M&T's counsel do not provide the "particularity" required to satisfy the strict standard of excusable neglect.

Other postal cards sent by the Clerk and duly received by the office of M&T's counsel have not been made of record, nor has the note left by Mr. Mitchell on February 13. There is no affidavit or statement by the clerk who "normally" checks the Law Journal in the office of M&T's counsel. No statement has been presented by any other attorney in the office of M&T's counsel that he did not know of the notice of entry, let alone an affidavit from each such attorney that he had no such knowledge, nor has any affidavit been presented by any member of the secretarial or clerical staff in the office of M&T's counsel relating to this matter. No search was ever made for the Clerk's card of January 12, 1976, other than in the file of this particu ar case.

There is no explanation of why, for a period of more than six weeks, neither of M&T's two attorneys made even a single telephone call, much less a visit to the Clerk's office, to check on the status of the case. There is no explanation of why the status of the case was not checked on January 14, 1976 when M&T's reply brief was ready to be filed (A 69), or why M&T's

counsel did not check the docket on January 15, 1976 when the reply brief was filed at the Court, or why Mr. Mitchell did not check the docket of this case on February 13, 1976 when he was personally at the Court instead of delaying until Mr. Razzano did so, or why Mr. Razzano had to be stirred into action by a note from Mr. Mitchell before checking the docket, or why, in view of the content of the Mitchell note, Mr. Razzano continued to delay checking the docket for several additional days.

Judge Carter's decision expressly notes that there are major deficiencies in M&T's "explanation" of the relevant events:

> "Plaintiff's counsel attempts to explain the failure to notice the entry of the LAW JOURNAL. But counsel has made no similar effort to explain why they did not call chambers or the clerk's office from January 5th to February 19th, a period of almost six weeks. The failure to make a telephone inquiry as to the status of a case for six weeks makes it impossible for me to view this as a case of

excusable neglect. The case had been decided adversely to the plaintiff on the original motion, and the likelihood of a motion for rehearing being decided favorably has to be considered very slight at best. Plaintiff was obligated to exercise due diligence to protect its right of appeal. The supporting affidavit is not persuasive in that regard. It advises that the lawyer working on the case was told to make inquiry about the status of the motion for reargument on February 13th. He, in fact, did not get around to making the telephone call until February 19th. Even assuming it was too late to call on February 13th and February 16th was a court holiday, that does not explain why no inquiry was made on February 17th and February 18th. [Citing case] Nothing presented justifies the court condoning failure to file the appeal within time." (A 107-8, underlining added.)

In view of the omissions and lack of explanation in the record, Judge Carter had no

alternative but to hold, as he did, that "Nothing presented justifies the court condoning failure to file the appeal within time" (A 108).

C. M&T's Counsel Did Not Discharge Their Affirmative Duty To Follow The Progress Of This Case

Judge Carter correctly held that (A 107):

> "A party has an affirmative duty to follow the progress of an action in which he is involved. Nichols-Morris Corp. v. Morris, 279 F.2d 81 (2d Cir. 1960)."

To similar effect, see Lathrop v. Oklahoma City Housing Authority, 438 F.2d 914 (10th Cir. 1971) and Long v. Emery, 383 F.2d 392, 394 (10th Cir. 1967).

M&T's counsel did not discharge this duty. During a period of 9-1/2 weeks following the filing of M&T's motion for reconsideration, M&T's counsel checked the status of the case with the Court only once and then, for the next six weeks, did not even make a telephone call to chambers or the Clerk's office. Although allegedly "assigned" to check the Law Journal daily, Mr. Razzano admits that he may not have checked

the issue of January 13, 1976, when notice of the Court's Order was published. M&T's counsel did not check with the Court in mid-January 1976 when their reply brief was filed even though there was considerable likelihood of a decision having been rendered by that time. Mr. Mitchell did not check the Court's docket on February 13, 1976, when he was personally present at the Court, even though it is apparent from his "note" that he suspected a decision might already have been rendered. And, even after having been informed of Mr. Mitchell's suspicion by a note from Mr. Mitchell on February 13, 1976, Mr. Razzano still delayed checking the docket until February 19, 1976. None of these delays is explained.

Where, as here, there are unexplained delays in counsel's taking action to file a notice of appeal, such unexplained delays prevent a finding of excusable neglect. Lowry v. Long Island Rail Road Co., 370 F.2d 911 (2d Cir. 1966), Nichols-Morris Corp. v. Morris, 279 F.2d 81, 83 (2d Cir. 1960). Any unexplained delay is fatal. In Brahms v. Moore-McCormack Lines, Inc., 21 FRServ. 73a. 54, Case 1

(SD NY 1955), for example, the Court held that there was no excusable neglect even though Plaintiff's notice of appeal was filed only two days late. M&T's argument to the contrary regarding one admitted "delay of two days" (M&T's brief on appeal, p. 29) is therefore incorrect.

D. The District Court's Decision Is Consistent With Precedent

At pages 17-18, M&T's brief on appeal presents argument to the effect that:

> "Denial of Excusable Neglect Requires A Finding Of Actual Notice"

This is an incorrect statement of the law. For instance, in Lathrop v. Oklahoma City Housing Authority, 438 F2d. 914 (10th Cir. 1971) no notice was sent to counsel for the parties following the District Court's denial of post-trial motions, and the Court of Appeals nevertheless held that an appeal from that denial was untimely since appellants had not discharged their affirmative duty of following the progress of the case.

The facts recited in M&T's affidavits are very similar to those in Brahms v. Moore-McCormack

Lines Inc., 21 FRServ. 73a.54 Case 1 (SD NY 1955). A copy of the Brahms decision is reproduced in the Joint Appendix (A 87). In that case, as here, a postal card bearing notice of entry of judgment was sent to Plaintiff's attorney by the Clerk of the Court but Plaintiff's attorney swore that he never saw that postal card and an associate of Plaintiff's attorney swore that a search of the office file of the case did not disclose any such card. However, Plaintiff's counsel in Brahms later extended their search for the card, and "found the card in the file of another case brought on behalf of Plaintiff". In these circumstances, taken together with counsel's failure to include a number of important statements in their showing (entirely similar to M&T's omissions herein), the Court in Brahms held that Plaintiff's counsel had failed to demonstrate excusable neglect.

Substantially the only difference between Brahms and the case now before this Court is that M&T's counsel have been less thorough than Brahms' counsel. M&T's counsel have apparently chosen not to look for the Clerk's notification card in any files other than the file of the instant litigation, presumably to avoid the consequences of the Brahms

decision by leaving the issue of "misfiling" open to conjecture. It is submitted, however, that M&T's counsel do not avoid the Brahms decision by merely neglecting to conduct the extended search which was made by counsel in Brahms.

M&T's counsel cannot properly justify their lack of diligence in following the progress of this case by a still further lack of diligence in looking for the Clerk's postal card notification.

E. M&T's Arguments Regarding The Clerk's Post Card Have No Substance

Much of M&T's brief on appeal is devoted to an argument that, even though IBM's counsel did receive the Clerk's post card notification mailed to the parties on January 12, 1976, (A 3, 88) M&T's counsel supposedly did not receive the card because it was "obviously misaddressed" (M&T brief, p. 29). It is submitted that there is no basis in fact for this argument, and that it is, at best, a diversion.

M&T's arguments regarding the Clerk's notice card have no substance for at least four reasons:

1. As correctly noted by Judge Carter (A 106-7), Rule 77(d) FRCP expressly states that lack of notice from the Clerk as to entry of the Court's Order does not affect the time to appeal, or relieve or authorize the Court to relieve a party from failure to appeal within the time allowed, except as permitted in Rule 4(a) FRAP. The Lathrop case, supra, is directly on point.

2. In this case, as in Brahms, supra (A 87) M&T's attorneys never alleged that they rely on absence of notice from the Clerk as proof that no judgment has been entered. To the contrary, counsel's telephone call to Judge Carter's chambers on January 5, 1976, and the fact that "the normal procedure in [their] office is to have decisions in the Law Journal checked daily by a clerk", demonstrate that M&T's counsel do not rely on nonreceipt of a post card from the Clerk of the Court for any purpose.

3. There is no basis for the conclusion reached by M&T's counsel that the card was "obviously mis-addressed". IBM's counsel did receive the card sent by the Clerk on January 12, 1976. The address of M&T's counsel is correctly stated on the Clerk's docket sheet for this case. It is clearly the practice of

the Clerk to use this correct address since M&T's counsel did receive cards sent by the Clerk both before and after January 12, 1976. All of this fully supports the inference drawn by Judge Carter "that a post card was, in fact, sent and that it was mailed to the correct address" (A 106).

4. M&T's counsel have not dispelled the very real possibility that the Clerk's card was duly received, but was then mishandled or misfiled, at the office of M&T's counsel. The only search conducted for the card has been confined to counsel's "file for this case". The card may very well be located elsewhere in the office of M&T's counsel even now, insofar as appears from their affidavits.

IV

CONCLUSION

It is submitted that, far from abusing his discretion, Judge Carter had no alternative but to conclude that there had been no showing of excusable neglect in this case, particularly in view of the clearly apparent carelessness of M&T's counsel and their failure to supply credible explanations or justification for numerous delays and record omissions.

It is submitted that the Court below did not commit a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors, cf. the Josephson decision. Since the sole issue before this Court is whether Judge Carter's refusal to extend the period of appeal was such a clear error of judgment as to constitute an abuse of judicial discretion, Judge Carter's decision should be affirmed.

Respectfully submitted,

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HERMAN KORETZKY,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief for Defendants-Appellees International Business Machines Corporation and Herman Koretzky in the above matter were served on John A. Mitchell, Esquire, attorney for Plaintiff-Appellant by mailing the same via first class mail postage prepaid to Curtis, Morris & Safford, P.C., 530 Fifth Avenue, New York, New York 10036, this 26th day of May, 1976.

Elliott I. Pollock